

2. Pole attachments refer to, *inter alia*, the placement of cable operator equipment on utility poles or in conduit or ducts owned or controlled by a utility company, including a local

exchange carrier.¹ The utility can charge the cable operator for the attachment of its facilities to the utility's poles or conduits. Section 224 of the Communications Act of 1934, as amended, empowers the Commission to adjudicate disputes between cable system operators and utilities concerning allegedly unjust and unreasonable pole or conduit attachment rates that no state regulates.² In enacting Section 224, Congress specified that each conduit attachment rate would be deemed just and reasonable if it:

assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying ... the percentage of the total duct or conduit capacity ... which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire ... duct, conduit, or right-of-way.³

This statutory language defines a zone of reasonableness for conduit attachment rates that extends from the utility's incremental costs to the cable operator's share of the utility's fully allocated costs. Incremental costs consist of those costs that the utility would not have incurred "but for" cable attachments.⁴ Fully allocated costs refer to the total operating expenses and capital costs of owning and maintaining conduits. Fully allocated costs are either incurred directly with respect to conduits or allocated to conduit activities and include depreciation, administrative, and maintenance expenses, taxes, and a return on investment.⁵

3. The case before us presents us with our first opportunity to address conduit attachment rates. As previously noted, Section 224 provides the basic methodology for computing the maximum just and reasonable pole and conduit attachment rates. In the paragraphs that follow, we describe how the methodology of Section 224 is applied to conduit attachment cases and how

¹ 47 U.S.C. § 224(a)(4). Section 224 is entitled "Regulation of Pole Attachments." The statute defines pole attachments to mean: "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." As such, the term pole attachment also applies to cable operators' wires and equipment that are positioned in conduit, ducts, or rights-of-way owned or controlled by local exchange carriers or electrical utilities. This *Order* sometimes refers to these attachments as "conduit attachments" to note the special circumstances of the case before us. Further, we note that Section 224 was expanded and amended under the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56, approved February 8, 1996. Presently, the Commission is in the process of amending its rules to reflect these changes. *E.g. Implementation of Section 703 of the Telecommunications Act of 1996*, FCC 96-327 (August 6, 1996). However, the issues presented in this case are unaffected by the changes made to Section 224.

² 47 U.S.C. § 224(b)(1).

³ 47 U.S.C. § 224(d)(1).

⁴ S. Rep. No. 95-580, 95th Cong., 1st Sess. 19 (1977).

⁵ *Id.* at 19-20.

our present pole attachment formulas can be adjusted and employed to determine the maximum just and reasonable conduit attachment rates.

4. Based on the statutory language contained in Section 224 and the legislative history, the Commission adopted Section 1.1409(c) of its rules.⁶ This section, as applied to conduit, translates the upper bound of the zone of reasonableness defined by Congress into the following formula:

$$\text{Maximum Rate}^7 = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times (\text{Operating Expenses} + \text{Capital Cost of Conduit})$$

5. The rule provides that in the context of conduit the percentage of the total usable space is the percentage of conduit capacity which is occupied by the attachment. We generally calculate the sum of operating expenses and capital cost of poles by multiplying the net cost of a bare pole times the carrying charges.⁸ Carrying charges refer to costs incurred by the utility in owning and maintaining conduit regardless of the presence of cable attachments.⁹ They include the utility's income tax, conduit maintenance, administrative, and depreciation expenses, as well as a return on conduit-related investment at the authorized intrastate rate of return.¹⁰ We express the carrying charges as a percentage that we calculate using formulas.¹¹

6. In this case, we multiply the net linear cost of the conduit (instead of the net cost of a bare pole) times the carrying charges so that the formula defining the upper bound of the zone of reasonableness becomes:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by CATV}}{\text{Total Usable Space}} \times \text{Net Conduit Cost per meter}^{12} \times \text{Carrying Charges}$$

⁶ 47 C.F.R. § 1.1409(c).

⁷ See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, *Report and Order*, 2 FCC Rcd 4387, 4388, ¶6 (1987)(*Pole Attachment Order*), *recon.*, 4 FCC Rcd 468 (1989).

⁸ 47 C.F.R. § 1.1409(c).

⁹ 47 C.F.R. § 1.1404(g)(9).

¹⁰ *Pole Attachment Order*, 2 FCC Rcd at 4391.

¹¹ *Id.* at 4388.

¹² We note, that conduit length can also be expressed in feet.

7. When we compute net cost of a bare pole, we multiply a factor times the net asset value of poles.¹³ The factor reflects non-cable related investment, such as guys and crossarms, that are included in the poles account.¹⁴ This factor is .85 for electric utilities or .95 for telephone companies.¹⁵ For conduit, we believe that there is no such comparable non-cable related investment; thus, the computation for net cost of conduit does not reflect the pole attachment factors. As a result, the net linear cost of conduit computation for utilities is illustrated as follows:

$$\text{Net Conduit Cost per meter} = \frac{\text{Net Conduit Investment}^{16}}{\text{Length (Meters)}}$$

8. In the *Pole Attachment Order*, we listed the regulatory accounts to be used, where possible, in applying the formulas to determine the maximum allowable rate for pole attachments.¹⁷ For telephone companies, the accounts we listed were in our existing uniform accounting system for telephone companies.¹⁸ Effective January 1, 1988, we replaced that accounting system with a new system that changed how telephone companies account for their costs, including those used in applying the pole attachment formulas.¹⁹ In a June 22, 1990 letter, the Common Carrier Bureau's Accounting and Audits Division (Division) provided guidance on how to apply the formulas using Part 32 accounts.²⁰ That letter indicates where expenses

¹³ 47 C.F.R. § 1.1409(c).

¹⁴ *Pole Attachment Order*, 2 FCC Rcd at 4389-90.

¹⁵ The two factors reflect the differences between telephone companies' and electric utilities' investment in crossarms and other non-pole investment that is recorded in the pole accounts. Electric utilities typically have more investment in crossarms than telephone companies have. The 0.85 factor for electric utilities recognizes this fact. *Pole Attachment Order*, 2 FCC Rcd at 4390.

¹⁶ Net Conduit Investment equals Gross Conduit Investment less its associated accumulated depreciation and deferred income taxes.

¹⁷ *Pole Attachment Order*, 2 FCC Rcd at Appendices A & B at 4402-4.

¹⁸ 47 C.F.R. Part 31 (1987).

¹⁹ 47 C.F.R. Part 32. Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, 51 Fed. Reg. 24745 (July 8, 1988) and 51 Fed. Reg. 433493 (Dec. 2, 1986); *recon in part*, 2 FCC Rcd 1086 (1987).

²⁰ Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, Common Carrier Bureau, to Paul Glist, Esq., Cole, Raywid & Braverman, 5 FCC Rcd 3898 (1990)(*June 22 Letter*).

recorded previously under Part 31 were required to be recorded under Part 32.²¹ The conduit attachment formulas under Part 32 are provided in Attachment A of this *Order*.²²

B. The Pleadings

9. Multimedia filed its complaint on December 30, 1994. In its complaint, Multimedia states that it owns and operates a cable television system serving Wichita, Kansas.²³ Multimedia also states that it has conduit attachment contracts with SWB, that it has occupied conduit space controlled by SWB pursuant to those contracts, and that it pays SWB an annual rental fee of \$.44 per foot for conduit space.²⁴ Using information provided by SWB and applying our pole attachment formula, Multimedia calculates that the maximum just and reasonable rate for its conduit attachments is \$.06 per foot per year, based on accounting data related solely to the Wichita, Kansas service area, or in the alternative \$.38 per foot per year, based on accounting data for the entire State of Kansas.²⁵ Multimedia urges the Commission to declare SWB's conduit attachment rate unlawful, to declare that SWB's methodology for calculation of conduit occupancy unlawful, to declare that SWB's practice of billing Multimedia for multiple parallel facilities placed in ducts results in unjust and unreasonable rates, to declare any separate non-video conduit occupancy rate unlawful, to substitute a lower rate for the \$.44 per foot rate for each conduit occupancy, to order refunds with interest of any payments in excess of the lawful rate, and to grant Multimedia costs and reasonable attorneys' fees incurred in the prosecution of the case.²⁶

10. In its response to Multimedia's complaint, SWB makes both procedural and substantive arguments. We address these arguments below.

²¹ *Id.* at 3898-99.

²² The main differences between pole and conduit attachment carrying charge formulas are that the formula for the conduit maintenance carrying charge is based on the asset Account 2441, Conduit systems, and the expense Account 6441, Conduit systems expense, and the formulas for depreciation and rate of return are based on Account 2441. The administrative and taxes carrying charge formulas are the same for poles and conduit because they are based on plant investment, instead of poles or conduit investment.

²³ Multimedia Complaint at 1-3.

²⁴ *Id.* at 3-10.

²⁵ *Id.* at 10-11.

²⁶ *Id.* at 12-14.

III. PROCEDURAL ISSUES

A. Sufficiency of Complaint

1. Failure to State a Claim

11. SWB asserts, as an affirmative defense, that Multimedia has failed to state a claim under our pole attachment rules because Multimedia has failed to take into consideration the significant differences between conduit systems and utility pole attachments.²⁷ This assertion is completely without merit. Our rules, while entitled "Pole Attachment Complaint Procedures," also apply to cable operators' attachments to or occupancies of ducts, conduits, or rights-of-way.²⁸ Multimedia has met all the requirements set forth in Section 1.1404 of our rules governing pole attachment complaints and has included a statement of the specific unreasonable pole attachment rate, term or condition and all arguments used to support its claim of unreasonableness.²⁹ As a result, Multimedia has established in its pleadings a *prima facie* conduit attachment case pursuant to our rules; thus, SWB's affirmative defense cannot stand.

2. Failure to Summarize Steps to Settle Case

12. SWB also asserts, as an affirmative defense, that Multimedia failed to provide a brief summary of all steps taken to resolve the problems prior to filing the complaint, as required by Section 1.1404(i).³⁰ Again, this assertion is without merit. Multimedia detailed the negotiations that Multimedia has had with SWB concerning the subject matter of this complaint and stated that it had also attempted unsuccessfully on numerous occasions to resolve these matters informally.³¹ We believe that Multimedia has satisfied the requirements of Section 1.1404(i) of our rules, and therefore we reject SWB's affirmative defense based on the failure of Multimedia to summarize the steps it has taken to settle the complaint.

3. Failure to Include Appropriate Data

13. Section 1.1404(g) of our rules requires pole or conduit attachment rate complainants to provide certain data and information in support of these complaints.³² SWB maintains that

²⁷ SWB Response at 36-37.

²⁸ See e.g., 47 C.F.R. § 1.1402(b), which defines the term "pole attachment" to include any attachment to ducts, conduits, or rights-of-way.

²⁹ 47 C.F.R. § 1.1404.

³⁰ SWB at 37-38.

³¹ Multimedia Complaint at 3-6, 12.

³² 47 C.F.R. § 1.1404(g).

Multimedia has not specified all information necessary to establish that the conduit rate is unjust and unreasonable; SWB asserts this failure as an affirmative defense to Multimedia's complaint.³³

14. The purpose of the information required by Section 1.1404(g) is to ensure that accurate, up-to-date information is utilized in pole attachment proceedings.³⁴ We find that Multimedia's complaint includes information specified in the rule. Although SWB disputes some of the numbers Multimedia uses in applying the formulas to calculate the maximum just and reasonable rate, the existence of those disputes does not require dismissal of the complaint.³⁵

4. Vague and Unclear Complaint

15. SWB additionally asserts that Multimedia's complaint is vague and unclear in its application of the Commission's pole attachment procedures with respect to the usable conduit space occupied by Multimedia's facilities.³⁶ SWB asks that we dismiss the complaint with prejudice. We address the substantive issues with respect to conduit space below. We believe that Multimedia has made a good faith effort to describe its conduit occupancy and how that occupancy should be factored into the conduit attachment formulas. We will not penalize Multimedia simply because we have not had occasion to rule on a conduit attachment case. We again reject SWB's affirmative defense.

B. Costs and Attorneys' Fees

16. In its complaint, Multimedia requested that we grant them costs and attorneys' fees resulting from the prosecution of this conduit attachment complaint.³⁷ SWB argues that we have no authority to grant such costs and attorneys' fees in pole attachment proceedings.³⁸ We agree with SWB that we do not have the authority to grant costs and attorneys' fees.³⁹ Thus, we dismiss Multimedia's request.

³³ SWB Response at 38-39.

³⁴ See *Pole Attachment Order*, 2 FCC Rcd at 4398, ¶84.

³⁵ See, e.g., *Capital Cities Cable, Inc. v. Southwestern Public Service Company*, PA 85-0005, Mimeo 5431 (Com. Car. Bur., June 28, 1985); *Riverside Cable TV, Inc. and Storer Cable Communications of Arkansas, Inc. v. Arkansas Power and Light Company*, PA 85-0001, Mimeo 4813 (Com. Car. Bur., May 30, 1985).

³⁶ SWB Response at 40.

³⁷ Multimedia Complaint at 13.

³⁸ SWB Response at 39.

³⁹ See *Comark Cable Fund III v. Northwestern Indiana Telephone Co.*, 100 FCC 2d 1244, 1257, n. 51 (Mar. 18, 1985); *Newport News Cablevision, Ltd. v. Virginia Electric & Power Co.*, 7 FCC Rcd 2610, 2613 (Com. Car. Bur., Apr. 27, 1992).

IV. SUBSTANTIVE ISSUES

A. Space Occupied by Cable

17. Our rules provide that in determining the maximum just and reasonable rate for a conduit attachment one begins with the "percentage of the total duct or conduit capacity which is occupied by the pole attachment."⁴⁰ We believe that the major issues in this case revolve around a prescription for a methodology for determining total conduit space, conduit space occupied by a cable operator, and usable space in a conduit. We will first address the determination of total conduit space and conduit space occupied by a cable operator.

18. There are numerous methods of approximating total conduit space and conduit space occupied by a cable operator. SWB attempts this computation by using what SWB refers to as a linear methodology.⁴¹ SWB's approach results in a cable operator being charged a rate based on the cost of one duct⁴² for each cable that the cable operator runs through SWB's conduit system. As an alternative, it might be possible to approximate conduit space by utilizing a pure cubic footage methodology as articulated by Section 224. Under this approach, total conduit space would be the total cubic footage of the conduit system. The amount occupied by the cable operator would be the total cubic footage of its cables in the conduit system. Another methodology would utilize a reasonable surrogate for a pure cubic footage methodology. Such a surrogate method could involve analyzing total capacity of the conduit system in terms of average number of ducts in conduit. A cable operator's occupancy could be approximated by dividing the number or portion of ducts it occupies by the average number of total ducts within the conduit system.

19. The parties have not stipulated any methodology, and thus, we are left to determine a methodology based on the tenets of Section 224. Section 224 clearly provides that total conduit space and conduit space occupied by cable operators are based on duct or conduit capacity. Section 224 states that: "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity..."⁴³ We do not adopt SWB's methodology because it gives no consideration to the actual space occupied by the cable operator. We also decline to adopt a pure cubic footage approach as being too difficult to apply. We believe that there are other approaches that provide

⁴⁰ 47 C.F.R. § 1.1409(c).

⁴¹ SWB Response at 12.

⁴² A conduit is a tube that contains many ducts each of which holds more than one single electric, telephone or cable wire.

⁴³ 47 U.S.C. § 224(d)(1).

reasonable estimates of capacity without using pure cubic footage. We apply herein the methodology posed by Multimedia. We describe the methodology in the paragraphs that follow.⁴⁴

20. During settlement conferences attended by the parties to this complaint and Commission staff, the Commission was presented data which indicated that SWB's Kansas conduit system contained 1,165 trench kilometers and 9,001 duct kilometers.⁴⁵ Based on these figures, SWB's Kansas conduit system contains an average of 7.73 ducts. We realize that conduit comes in different shapes and sizes and that the number of ducts per conduit also varies; the figure of 7.73, however, represents the average of the system. The average number of ducts serves as the basis for the denominator of the occupied space component of the conduit attachment formula. This figure is used as a surrogate for total conduit space.

21. The space occupied by Multimedia can be estimated based on the number of ducts or portion of a duct that its cable occupies. With respect to a duct, the space occupied by Multimedia is the portion of the duct capacity that the cable operator occupies. However, in this case, the actual portion of the space occupied is in dispute. Multimedia claims that their conduit attachment rate should only be one-half the rate of a full-duct because their cable attachment occupies only one-half of the duct or less. In support of this half-duct rate, Multimedia refers to the methodology adopted by the Massachusetts Department of Public Utilities ("MDPU").⁴⁶

22. In the MDPU decision, the MDPU found that the half-duct methodology was a reasonable solution for use in establishing a conduit attachment rate for the complainant, cable operator.⁴⁷ The MDPU held that since the space occupied by the cable operator required the use of a half-duct only, and that its use did not preclude the use of the other half of the conduit, the

⁴⁴ The formula we apply in this case can be represented as follows:

$$\text{Maximum Rate} = \frac{1 \text{ Duct}}{\text{Avg. \# of Ducts - Adjustments for reserved ducts}} \times \frac{1}{2} \times \text{Net Linear Cost of Conduit} \times \text{Carrying Charges}$$

We refer to the first fraction in the above formula as the "occupied space component" of the conduit attachment formula.

⁴⁵ Letter dated September 1, 1995 from Jonathan W. Royston, Attorney for SWB, to Paul Glist, Attorney for Multimedia; Letter dated September 6, 1995 from Paul Glist, Attorney for Multimedia, to Jonathan W. Royston, Attorney for SWB ("Letter of September 6, 1995"). A "trench kilometer" is the length of the ditch that contains the duct. In order to obtain the "duct kilometer" you must multiply the average number of ducts x the length of the trench kilometer.

⁴⁶ See *Greater Media, Inc. v. New England Telephone and Telegraph*, Massachusetts D.P.U. 91-218 (1992). The state of Massachusetts has the authority to regulate the rates, terms, and conditions for pole attachments under Section 224 of the Communications Act of 1934, as amended. See 47 U.S.C. § 224(c)(1). We note, that the Massachusetts pole attachment regulations are similar to Section 224.

⁴⁷ *Id.*

cable operator should only be charged for a half-duct.⁴⁸ Moreover, the MDPU found that unless a cable operators conduit precludes use by other conduit attachers of the other half of the duct, the cable operator should pay only for a half-duct.⁴⁹ Based on the record, we believe that the actual portion of the duct occupied by Multimedia is one-half or less. Thus, consistent with Multimedia's suggestion, we will follow the MDPU's decree and adopt a presumptive half-duct methodology.⁵⁰ We consider this to be the simplest and most straight forward approach.⁵¹ In order to calculate this formula, a determination of the cost per foot of one duct must be made, and then divided by one-half to produce a "half-duct convention." This determines the maximum just and reasonable rate per duct foot that can be charged for cable attachments. Accordingly, we require Multimedia to serve on the Commission information concerning the number of cables and the length of each cable that Multimedia has laid in SWB's Wichita conduit system.

B. Usable Space

23. Our pole attachment formula calculates a cable operator's share of pole expenses based on only the usable space of the pole. In the case of 30 and 40 foot poles, we estimate the usable space to be 11 feet and 16 feet respectively.⁵² The average of those two numbers, 13.5 feet, serves as the denominator of the usable space component.⁵³ In contrast, most of the ducts in conduits are considered usable. There may, however, be situations in which a utility might reserve a duct for maintenance, and, in doing so, might create unusable space.

24. In the present case, we rule that if SWB reserves one duct for maintenance, and if Multimedia has the right to utilize that reserved space in the event of a cable break or benefits in any way from the reservation of that space, that reserved duct shall be considered unusable

⁴⁸ *Id.* at 39, 40.

⁴⁹ *Id.*

⁵⁰ The half-duct convention is not intended to serve as precedent in other cases until the Commission considers the issue further in a future rulemaking.

⁵¹ We recognize that this presumption does not make any distinction as to the size of the cable or whether the cable operator utilizes coaxial or fiber optic cable. Currently, we are unaware of any cable operators who use cable in excess of 1.5 inches in diameter. Thus, it is not technically feasible that a cable operator would occupy the entire duct with a single attachment.

⁵² Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, 68 FCC 2d 1585 (1978)(*First Report and Order*), Second Report and Order, 72 FCC 2d 59, 69 (1979)(*Second Report and Order*). See also Third Report and Order, 77 FCC 2d 187, 192 (1980)(*Third Report and Order*), *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985)(*per curiam*).

⁵³ 47 C.F.R. § 1.1404(g)(11); *Second Report and Order*, 72 FCC 2d at 69. See also *Third Report and Order*, 77 FCC 2d at 192. The term "usable space component" is used with respect to pole attachments. It is similar to what we have termed the "occupied space component" for conduit attachments; however, in the case of pole attachments, there is a much clearer delineation of usable and unusable space.

space. In that event, the denominator of the occupied space component, the average number of ducts, should be reduced by the number of such reserved ducts. If Multimedia has no right to use that space or receives no benefit from that duct, we hold that the denominator should not be reduced.

25. We require that SWB file with the Commission information concerning the existence and use of a maintenance duct. Based on that information and any other required to be filed by the ALJ, the ALJ shall determine whether SWB has established that a duct(s) or a portion thereof that is reserved for maintenance shall be excluded from the denominator of the conduit space formula. Such determination shall be based on the criteria of whether the cable operator receives a benefit from the reservation of such duct.

C. Statewide Data

26. Multimedia requests that we require SWB to submit cost data that details the costs associated with SWB's conduit system in Wichita, Kansas rather than receive conduit data for the State of Kansas as a whole.⁵⁴ Multimedia argues that the Wichita data should be used in the conduit attachment formulas and would better represent the costs of the Wichita conduit system rather than statewide information.⁵⁵ SWB objects to the use of Wichita conduit costs because its cost information is maintained on a statewide basis and because the Commission has always required statewide data to be used in the pole attachment formulas.⁵⁶

27. We agree with SWB that conduit attachment formulas should be based on statewide figures. Our rules contemplate that information filed with regulatory agencies serve as the basis for pole and conduit attachment computations.⁵⁷ This data is prepared on a statewide, rather than a system-specific basis.⁵⁸ We believe that statewide information provides readily obtainable data to be used in pole or conduit attachment rate computations and should continue to serve as the basis for these computations.

⁵⁴ Multimedia Complaint at 7-9, 13.

⁵⁵ *Id.* at 7-9.

⁵⁶ SWB Response at 24-25.

⁵⁷ 47 C.F.R. § 1.1404(g).

⁵⁸ See, e.g., *Teleprompter Corp. v. Mountain States Telephone & Telegraph Co.*, Mimeo No. 002877 (Aug. 21, 1981); *Teleprompter Corp. v. General Telephone Co. of Southwest*, Mimeo No. 001985 (July 14, 1984); *Scripps-Howard Cable Services Co. v. Florida Power Co.*, Mimeo No. 3003 (Mar. 8, 1985). See also *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1274-75 (5th Cir. 1986).

D. Operating Expenses

1. Administrative Expenses

a. Parties' Positions

28. Multimedia and SWB disagree with respect to the computation of the administrative component of the carrying charges. Under our former Part 31 accounting system, telephone companies used Accounts 661 through 665 and Accounts 668 through 677 to record general and administrative expenses.⁵⁹ Under our Part 32 rules, telephone companies use various accounts to record those expenses.⁶⁰ Multimedia includes Accounts 6710, Executive and planning, and 6720, General and administrative, in the numerator of the administrative component calculation.⁶¹ In addition, Multimedia uses Total Telephone Plant as the denominator for the administrative component computation.⁶²

29. SWB contends that amounts recorded in Account 6535, Engineering expense, should also be included in the numerator of the administrative component computation.⁶³ SWB states that the Commission's rules do not require any portion of Account 6535 to be removed from the computation of the administrative component.⁶⁴ SWB also argues that the numerator of the administrative factor should reflect any conduit-associated benefits or rents under Account 6441.⁶⁵ Finally, SWB contends that Account 2001, Total Telephone Plant in Service, should serve as the denominator of the administrative component computation.⁶⁶

⁵⁹ 47 C.F.R. §§ 31.661-665, 31.668-677 (1987).

⁶⁰ See June 22 Letter, 5 FCC Rcd at 3898. Part 32 accounts include Account 6411, Poles Expense (which is not applicable here); Account 6124, general purpose computers expense; Account 6724, Information management; Account 6535, Engineering expense; Account 6611, product management; Account 6612, sales; Account 6613, Product Advertising; Account 6621, Call completion services; Account 6622, Number services; Account 6623, Customer Services; Account 6722, External relations and Account 6726, Procurement.

⁶¹ Multimedia Complaint at Exhibit 4.

⁶² *Id.*

⁶³ SWB Response at Appendices A and B.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

b. Discussion

30. We first note that Multimedia, in its reply to SWB's response, indicates that it has no objection to the inclusion of conduit-associated benefits and rents in the numerator of the administrative component computation.⁶⁷ Thus, we direct SWB to file information with the Commission concerning the amounts of conduit-associated benefits and rents to be included.

31. For the second issue concerning the administrative component calculation, we must utilize a methodology that attempts to equate our calculations under Part 32 with those under Part 31. Account 6535, Engineering expense, is intended to be used to record general engineering expenses that are not directly chargeable to specific undertakings or projects.⁶⁸ According to the *June 22 Letter*, a portion of Account 6535 would include expenses that under Part 31 would have been recorded in Account 675 or cleared to Account 602:1.⁶⁹ Because the Commission determined that administrative component calculations should reflect all amounts recorded in Account 675,⁷⁰ we hold that a portion of Account 6535 should be included in the numerator of the calculation of the administrative component. We conclude that any portion of Account 6535 that would have been previously recorded in Account 675 shall be included in the numerator of the administrative component calculation.⁷¹

32. The record does not make clear what portion of Account 6535 SWB would have included in pole attachment rate calculations under Part 31. To expedite resolution of the complaints, we require SWB to file that information with the Commission. We direct the ALJ to resolve any issue that develops in this regard.

33. We also note that in Multimedia's reply to the response of SWB, that Multimedia acknowledges that, due to a typographical error, it used Total Kansas Telephone Plant in the denominator of the administrative component computation.⁷² We accordingly direct that Account 2001, Total Telephone Plant in Service, be utilized as the base for the denominator of the administrative component computation.

⁶⁷ Multimedia Reply at Exhibit 7.

⁶⁸ 47 C.F.R. § 32.6535; *June 22 Letter*, 5 FCC Rcd at 3898.

⁶⁹ *Id.* at 3898 & 3901.

⁷⁰ *Pole Attachment Order*, 2 FCC Rcd at Appendix B at 4404.

⁷¹ See *UACC Midwest, Inc. v. South Central Bell Telephone Company*, 10 FCC Rcd 10905, 10907 (Com. Car. Bur., June 15, 1995).

⁷² Multimedia Reply at Exhibit 7.

2. Taxes

34. Multimedia also used the Total Kansas Telephone Plant in the denominator of the taxes component computation. As discussed above, Multimedia has acknowledged this error.⁷³ We accordingly direct that Account 2001, Total Telephone Plant in Service, be utilized as the base for the denominator of the taxes component computation.

3. Cost of Capital

35. In applying the pole attachment formulas, Multimedia includes a rate of return of 11.25% which it indicates is the default rate of return used by the Commission for local exchange and cable rates.⁷⁴ SWB instead utilizes a rate of return of 12.19%, which was derived by the Kansas Corporation Commission sometime during the mid-1980s.⁷⁵

36. In the past, for the computation of the rate of return carrying charge, telephone companies and electric utilities have utilized the rate of return for intrastate services as announced by the applicable state public service commission. Kansas presents us with the problem of a state that has adopted price regulation and no longer announces such a rate of return. In prior pole attachment cases, we have required that parties employ the weighted average cost of debt and equity as announced by the appropriate state regulatory authority as the cost of capital component because that figure provides the best estimate of the costs incurred by a utility in attracting capital, including that invested in poles and conduit.⁷⁶ We still believe that the weighted average cost of debt and equity is the proper cost of capital figure. Because Kansas no longer announces this figure, we direct SWB to submit information to the Commission concerning its weighted average cost of capital, both debt and equity, for the State of Kansas during the years in question. This information shall be used to compute the cost of capital carrying charge to be included in the conduit attachment rate formulas.

E. Retroactive Billing

37. The record indicates that, on October 27, 1994, SWB retroactively billed Multimedia for placing more than one cable in SWB's conduit from July 1, 1991.⁷⁷ Multimedia subsequently filed a conduit attachment complaint on December 30, 1994. According to Section 1.1410(c) of

⁷³ *Id.*

⁷⁴ Multimedia Complaint at Exhibit 4.

⁷⁵ SWB Response at 32 and Appendix D.

⁷⁶ See *Telecable of Piedmont, Inc. v. Duke Power Company*, 10 FCC Rcd 10898 (Com. Car. Bur., June 15, 1995).

⁷⁷ Multimedia Complaint at Exhibit 2.

our rules, refunds in pole or conduit attachment cases accrue from the date the complaint is filed. As a result, we require that SWB's Kansas conduit attachment rates should be recomputed for the period since December 30, 1994, using the methodology described in Part IV of this *Order*.⁷⁸ If the recomputed rates are in excess of that paid by Multimedia, we require Multimedia to pay the difference, with interest, to SWB. In the event that Multimedia paid amounts in excess of the recomputed conduit attachment rates for this period, we require SWB to refund the difference to Multimedia, with interest.

38. To assist the ALJ in efforts to decide the case based on a paper record, we direct SWB to file with the Commission the data required by Section 1.1404(g) and any other data needed to calculate the maximum just and reasonable rates pursuant to our conduit attachment formulas. We also require that Multimedia submit information with the Commission concerning the amount of conduit rates paid to SWB and the amount of linear feet that its cables occupy in SWB's Kansas conduit system in each of the years since December 30, 1994.

V. CONCLUSION

39. To expedite this proceeding, we designate this complaint for a hearing before an ALJ pursuant to Section 1.1411 of the rules.⁷⁹ In taking this step, we direct the presiding ALJ to use procedures designed to encourage the parties to settle the case or narrow their differences. This *Order* has directed that the parties submit various data to the Commission in order to expedite the ALJ's decision making process. In every instance, the parties should support the data submitted by an accompanying affidavit. The ALJ may also request one or both of the parties to provide any additional information deemed necessary to clarify the issues or facilitate their resolution. If the parties are unable to settle the case, the ALJ will attempt to decide this case based on the paper record. If unable to do so, the ALJ shall have discretion to conduct such further proceedings as deemed necessary and to add any issues during the hearing that will aid in resolving the complaint.

40. If the parties fail to reach a settlement, the ALJ will determine whether SWB charged Multimedia conduit attachment rates in excess of the maximum allowable in accordance with Section 1.1409(c) and the guidelines of paragraphs 36 and 37 above.⁸⁰ If the rates are unlawful, the ALJ shall determine the refund amount that is to be paid pursuant to Section 1.1410 of the rules and the guidelines of paragraphs 36 and 37 above.⁸¹

⁷⁸ We also note that although the Commission generally only reviews pole attachment rates from the date a complaint is filed, nothing in this *Order* should be interpreted as our holding that SWB was entitled to retroactively bill for the period before October 27, 1994.

⁷⁹ See 47 C.F.R. § 1.1411.

⁸⁰ 47 C.F.R. § 1.1409(c).

⁸¹ 47 C.F.R. § 1.1410.

41. The ALJ shall also determine whether, based on its double-occupancy of SWB's Kansas conduit system, the recomputed rates are in excess of that paid by Multimedia or whether Multimedia paid amounts in excess of the recomputed conduit attachment rates for the period beginning on December 30, 1994.

VI. ORDERING CLAUSE

42. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), and 224, that the complaint Multimedia Cablevision, Inc. filed December 30, 1994, against Southwestern Bell Telephone Company IS GRANTED to the extent indicated in Parts III and IV of this Order, IS DISMISSED to the extent indicated in Parts III and IV, and to the extent neither granted, nor dismissed, IS REFERRED to an Administrative Law Judge.

43. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j), and 224, that the above-captioned complaint proceeding IS DESIGNATED FOR HEARING before an Administrative Law Judge either on a paper record or as required at a time and place to be specified in a subsequent order upon the following issues:

1. To determine whether SWB charged Multimedia conduit attachment rates that exceeded the maximum amounts allowable under Commission rules during the period covered by the complaint.
2. If SWB has charged Multimedia excessive conduit attachment rates during the period covered by the complaint, to determine the amounts of the refunds, plus interest on refunds accruing after December 30, 1994, SWB must pay Multimedia.
3. To determine whether Multimedia has underpaid conduit attachment rates during the period covered by the complaint.
4. If Multimedia has underpaid conduit attachment rates, to determine the amounts Multimedia must pay to SWB.

44. IT IS FURTHER ORDERED, that the burden of proof and the burden of proceeding with the introduction of evidence SHALL BE UPON complainant, except that respondent shall bear the burden of proof with respect to the issues of whether complainant has underpaid conduit attachment rates since December 30, 1994 and whether complainant has received a benefit from any reserved duct.

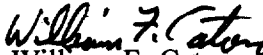
45. IT IS FURTHER ORDERED, that the designated parties may avail themselves of an opportunity to be heard by filing with the Commission a Notice of Appearance in accordance

with Section 1.221 of the Rules, 47 C.F.R. §1.221, within twenty (20) days of the mailing of this *Order*.⁸²

46. IT IS FURTHER ORDERED, that SWB and Multimedia SHALL FILE the information set forth above, within thirty (30) days of the mailing of this *Order*.

47. IT IS FURTHER ORDERED, that the parties SHALL ADDRESS any exceptions to the ALJ's decision in this proceeding to the Commission.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

⁸² The separated trial staff will file an appropriate Notice of Appearance before participating in the proceedings before the presiding ALJ.

ATTACHMENT A

CONDUIT ATTACHMENT FORMULAS

$$\text{Maximum Rate} = \frac{A}{B} \times \frac{1}{2} \times C \times D$$

$$\text{Net Linear Cost of Conduit} = \frac{E-F-G^*}{I}$$

$$\text{Net Conduit Investment} = E-F-G^*$$

$$\begin{array}{l} \text{Accumulated} \\ \text{Deferred} \\ \text{Income Taxes} \\ \text{(Conduit)} \end{array} = \frac{E}{K} \times M^*$$

$$\begin{array}{l} \text{Depreciation} \\ \text{Carrying} \\ \text{Charge} \end{array} = O \times \frac{E}{H}$$

$$\text{Administrative} = Q \div X$$

$$\text{Taxes} = S \div J$$

$$\text{Maintenance} = U \div W$$

KEY

- A = Space Occupied by CATV (1 duct)
- B = Average # of Ducts (Duct km/Trench km)
- C = Net Linear Cost of Conduit
- D = (N+P+R+T+V)
- E = Gross Conduit Investment in Part 32, Account 2441
- F = Depreciation Reserve (Conduit)
- G = Accumulated Deferred Income Taxes (Conduit)
- H = Net Conduit Investment
- I = Total Conduit Feet
- J = Net Plant Investment
- K = Total Gross Plant Investment
- L = Total Depreciation Reserve

-
- M = total Accumulated Deferred Income Taxes*
N = Depreciation Carrying Charge
O = Depreciation Rate for Conduit
P = Administrative Carrying Charge
Q = Total General and Administrative Expenses
R = Tax Carrying Charge
S = Total Current and Deferred Tax Expense
T = Maintenance of Carrying Charge
U = Conduit Maintenance Expense
V = Cost of Capital (Return) = Return Authorized by State Regulatory Commission (or as described in this *Order*)
W = Net Investment in Conduit*
X = Net Plant Investment*

* We are treating deferred taxes as most state commissions do - as a rate base deduction. If the state utility commission includes the reserve for deferred income taxes in the utility's capital structure at zero cost, we would not need to make any further adjustment.